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November 12, 1998

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
1919 M St., NW  
Washington, DC 20554

Re: *Ex parte* presentation in MM Docket 97-247

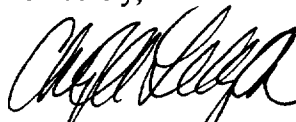
Dear Ms. Salas:

Today, between 12 noon and 12:15 pm, Cheryl A. Leanza faxed the attached documents to: Susan Fox, Office of Chairman Kennard, Anita Wallgren, Office of Commissioner Ness, Jane Mago, Office of Commissioner Powell, Rick Chessen, Office of Commissioner Tristani, and Helgi Walker, Office of Commissioner Furchtgott-Roth.

The attachments urge the Commission to adopt the proposals UCC *et al.* suggested in their comments with respect to what services should be subject to fees under 47 U.S.C. § 336(e)(1).

Pursuant to section 1.1206(b)(2) of the Commission's rules, two copies of this letter and its attachments are being filed with your office today.

Sincerely,



Cheryl A. Leanza  
Staff Attorney

Attachments

No. of Copies rec'd 0+1  
USAGC DE



**Subject: Look for Fax for MM Docket No. 97-247**

**Date: Thu, 12 Nov 1998 12:04:57 -0500**

**From: Cheryl Leanza <cleanza@essential.org>**

**To: sfox@fcc.gov, awallgre@fcc.gov, jmago@fcc.gov, rchessen@fcc.gov, hwalker@fcc.gov**

**CC: Gigi Sohn <gsohnnnn@counsel.com>**

To reach you before the Sunshine Notice for next week's open meeting, I have just faxed you over the most important portion of UCC et al's comments in this proceeding. The most critical issue is the services that will be subject to fees -- we urge you to ensure the full scope of services that fall within the statutory definition are included.

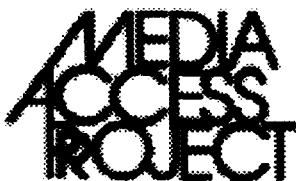
Please do not hesitate to contact us if you have any questions. I am submitting both the fax and email as an ex parte filing via the Commission's electronic filing system momentarily.

--

Cheryl A. Leanza  
Media Access Project  
1707 L St., NW  
Suite 400  
Washington, DC 20036

(202) 232-4300  
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## FACSIMILE TRANSMISSION



FROM: Cheryl A. Leanza

Phone: (202) 232-4300

Fax: (202) 466-7656

E-mail: cleanza@essential.org

TO: Susan Fox  
Anita Wallgren  
Rick Chesson  
Jane Mago  
Helgi Walker

1707 L Street, NW  
Suite 400  
Washington, DC 20036

Date: November 12, 1998

This message contains a total of 5 page(s), including this page.

### Message:

Gigi Sohn and I would like to emphasize that the most critical issue in the Ancillary and Supplementary Digital Television Fees proceeding, MM Docket No. 97-247, is the Commission's decision as to what services are subject to those fees.

I am including pages 12 through 15 of UCC *et al.*'s comments in this proceeding for your review.

Please do not hesitate to contact me with any questions.

The message above is a privileged communication intended only for the named addressee(s). All others handling this message are instructed to deliver it immediately to the named addressee(s) without reading it. If this is not possible, the message should be immediately destroyed, and the sender promptly notified at (202) 232-4300.

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MAY - 4 1998

*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Fees for Ancillary or Supplementary Use of Digital  
Television Spectrum Pursuant to Section 336(e)(1)  
of the Telecommunications Act of 1996

MM Docket No. 97-247

To the Commission:

**COMMENTS OF UCC, *et al.***

Gigi B. Sohn  
Cheryl A. Leanza  
Andrew Jay Schwartzman

Law Student Intern:

Daria Williams  
National Law Center  
George Washington University

Media Access Project  
1707 L Street, NW  
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May 4, 1998

*Counsel for UCC, et al.*

Commission will hold them accountable for the accuracy of the information they provide.

**IV. FEES SHOULD BE IMPOSED ON HOME SHOPPING, INFOMERCIAL, DIRECT MARKETING AND OTHER SERVICES FOR WHICH A PER-TRANSACTION OR OTHER FEE IS PAID AND ON COMPENSATION BROADCASTERS RECEIVE IN EXCHANGE FOR "RETRANSMISSION CONSENT."**

Congress directed the FCC to impose fees on ancillary and supplementary services:

(A) For which the payment of a subscription fee is required in order to received such services, or

(B) for which the licensee directly or indirectly receives compensation from a third party in return for transmitting material furnished by such third party (other than commercial advertisements used to support broadcasting for which a subscription fee is not required),...

47 USC §336(e)(1).

In the conference report, Congress clarified that fees should be imposed "if subscription fees or *any other compensation* apart from commercial advertisements are required in order to receive such services." H.R. Conf. Rep. No. 458, 104th Cong, 2nd Sess. 160 (1996) [Emphasis added.] As the Commission recognizes, this is a broad definition that requires fee assessment on "any ancillary and supplementary services that are not supported entirely by commercial advertisements." *NOPR* at ¶8.

Under this definition, home shopping, infomercial, direct marketing and other services for which broadcasters receive a per-transaction fee or other similar compensation are "feeable" ancillary and supplementary services. In addition, any fees that broadcasters receive from cable operators in exchange for cable carriage are also compensation subject to whatever fee structure the Commission creates.<sup>6</sup>

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<sup>6</sup>The Commission should consider treating the value of time afforded without charge to candidates for public office as an offset against revenues. Section 336(e)(2)(A) directs the

A. *Home Shopping/Infomercial Programming/Direct Marketing*

Typically, a broadcaster transmits home shopping programming in exchange for payment of a per-transaction fee by the vendor.<sup>7</sup> With respect to infomercial programming, there may be any number of arrangements by which a broadcaster receives payment. In some cases, the infomercial provider pays the broadcaster to air programming. In others, the infomercial provider agrees to share the proceeds from sales with the broadcaster, or the broadcaster may receive a "per-inquiry" fee from the infomercial provider. In all of these cases, the compensation received by the broadcaster clearly falls under the plain language of Section 336(e), which requires the Commission to impose fees when a licensee "directly or indirectly receives compensation from a third party in return for transmitting material furnished by such third party...." 47 USC §336(e)(1)(B).

For the same reasons, direct marketing and other similar arrangements by which broadcasters obtain a per-transaction fee for sales are also feeable ancillary and supplementary services. Some of these transactions may accompany free digital and high definition television programming.<sup>8</sup> For example, a viewer watching her favorite football team might click on a special icon

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Commission "to recover for the public a portion of the value of the public spectrum resource made available for such commercial use,..." It does not specify that the "value" must be received entirely in cash. Section 336(e)(3)(A) uses the term "proceeds" in directing that amounts received be directed to the general treasury. There is no indication of any Congressional intent that the "value" received by the public must be coextensive with the "proceeds" deposited. Rather, it is entirely reasonable to construe the term "proceeds" as referring only to cash generated from fees.

<sup>7</sup>In the case of programming provided by various home shopping programming networks, the network itself is the vendor that pays the broadcaster.

<sup>8</sup>That some transactions take place during the broadcast of a free service is of no import. The Commission recognizes that "feeable ancillary and supplementary services may be offered simultaneously with other services." *NOPR* at ¶8.

that provides her with an instant opportunity to buy the team jersey for \$34.95, two dollars of which goes to the broadcaster. Under Section 336, this "compensation" to the broadcasters is also "feeable."<sup>9</sup>

*B. Retransmission Consent Fees and In-Kind Compensation*

The battles over digital "must carry" have been well documented. Broadcasters are seeking to extend the current right to cable carriage for their analog signals to their future digital signal. "Cable Warns of Likely Public Reaction to DTV Must-Carry," *Communications Daily*, April 23, 1998 at 2. Cable operators, on the other hand, argue that they have neither the legal duty, nor the capacity, to carry both the analog and digital signals. *Id.*

What has also been reported is that some, mostly larger, broadcasters are in serious negotiations with cable operators to ensure carriage of their digital signals. Paige Albinak, "No Must, no fuss," *Broadcasting & Cable*, April 27, 1998 at 4. It is possible, and perhaps even likely, that cable operators will pay these broadcasters a per-subscriber fee and/or other

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<sup>9</sup>Gary Arlen describes the revenue opportunities presented by digital shopping services:

Shopping is a good example of a migration path from simply airing commercials into profiting from the transactions and product sales\*\*\*\*\*

The lessons of Direct Marketing have formed the basis of much of the e-commerce on the World Wide Web. And in turn, those experiences can be transferred to the bigger bandwidth of Digital TV - creating a challenging new line of business in which broadcasters can get a "piece of the action" on transactions conducted via their bandwidth\*\*\*\*\*

These huge new interactive sales industries - generating \$1 billion in sales in 1997, expected to quintuple by 2002 - hint at the opportunity awaiting broadcasters. Creative alliances and participation in broadband merchandising represent entirely new business opportunities.

compensation for the right to carry their signals, *i.e.*, pay them for retransmission consent."<sup>10</sup>

In other cases, broadcasters may exchange barter or in-kind benefits, such as subscriber demographic data or other information, for cable carriage and a share of cable operators' revenues.

In the latter scenario, carriage of the digital signal is part of the compensation that is subject to fees.

In both of these cases, "other compensation apart from commercial advertisements [is] required to receive" the digital TV signal. Thus, the Commission must apply its fee structure both to cash payments a broadcaster receives for cable carriage, but also to the value of any other benefits (*e.g.*, cable carriage) a broadcaster receives as a part of a barter agreement with cable operators.

**V. PUBLIC BROADCASTERS' ANCILLARY AND SUPPLEMENTARY SERVICES SHOULD BE EXEMPT FROM FEES ONLY IF THOSE SERVICES ARE NOT ADVERTISER-SUPPORTED.**

The Commission notes that public television licensees have requested that they be relieved from any obligation to pay fees when they offer feeable ancillary and supplementary services. *NOPR* at ¶30. The licensees seek the exemption to help fund their noncommercial programming.

UCC, *et al.* generally support this exemption. The additional capacity provided by digital transmission will allow public television licensees to supplement their meager government funding with extra revenues that will be used to provide more and better noncommercial programming

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<sup>10</sup>Since the inception of retransmission consent in the 1992 Cable Act, most broadcasters have been unable to extract cash for retransmission consent. In the digital world, however, broadcasters will have more leverage. For the short term, cable operators wishing to sell subscribers access to their "digital tiers" will be without programming that would entice them to pay extra for this service. The addition of digital broadcast programming could provide an incentive for cable viewers to subscribe to the digital tier. For this reason, cable operators will likely be willing to pay digital broadcasters for their digital signals.